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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 RODNEY AUSTIN,
9 Plaintiff,
10 v.
11 MICHAEL J. ASTRUE, Commissioner of
Social Security,
12 Defendant.

No. C-12-3349 EMC

**ORDER GRANTING
MOTION FOR SUM-
JUDGMENT; DENY-
CROSS-MOTION FOR
JUDGMENT; AND
ADDITIONAL PRO-**

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT; AND REMANDING FOR
ADDITIONAL PROCEEDINGS**

16 On February 26, 2010, Plaintiff Rodney Austin filed an application for Supplemental
17 Security Income (“SSI”) benefits, alleging disability beginning October 27, 1994. His claim was
18 denied. Mr. Austin has exhausted his administrative remedies with respect to his claim of disability.
19 This Court has jurisdiction to review the administrative decision pursuant to 42 U.S.C. § 405(g).
20 Mr. Austin has moved for summary judgment or, in the alternative, a remand for additional
21 proceedings. The Commissioner has cross-moved for summary judgment. Having considered the
22 parties’ briefs and accompanying submissions, the Court hereby **GRANTS** Mr. Austin’s motion for
23 summary judgment and **DENIES** the Commissioner’s motion.

I. FACTUAL & PROCEDURAL BACKGROUND

25 In February of 2010, Mr. Austin filed an application for SSI benefits, alleging disability as of
26 October 27, 1994, due to combined mental and physical impairments. *See* AR 112-19 (Application
27 and Amendments to Application). Mr. Austin's application was initially denied on September 29,
28 2010. *See* AR 54-57 (Notice of Disapproved Claims). Subsequently, his request for reconsideration

1 was denied on January 18, 2011. *See* AR 61-66 (Notice of Reconsideration). Mr. Austin requested
2 a hearing before an Administrative Law Judge (“ALJ”). *See* AR 82 (Request for Hearing by ALJ).
3 A hearing was conducted before an ALJ on October 3, 2011. *See* AR 31-48 (Hearing Transcript).

4 On October 26, 2011, the ALJ held that Mr. Austin was not disabled under the Section
5 1614(a)(3)(A) of the Social Security Act. *See* AR 25. The ALJ evaluated Mr. Austin’s disability
6 claim using the five-step sequential evaluation process required under 20 C.F.R. §§ 404.1520 and
7 416.920.

8 Step one disqualifies claimants who are engaged in substantial gainful
9 activity from being considered disabled under the regulations. Step
10 two disqualifies those claimants who do not have one or more severe
11 impairments that significantly limit their physical or mental ability to
12 conduct basic work activities. Step three automatically labels as
13 disabled those claimants whose impairment or impairments meet the
14 duration requirement and are listed or equal to those listed in a given
15 appendix. Benefits are awarded at step three if claimants are disabled.
16 Step four disqualifies those remaining claimants whose impairments
do not prevent them from doing past relevant work considering the
claimant’s age, education, and work experience together with the
claimant’s residual functional capacity (“RFC”), or what the claimant
can do despite impairments. Step five disqualifies those claimants
whose impairments do not prevent them from doing other work, but at
this last step the burden of proof shifts from the claimant to the
government. Claimants not disqualified by step five are eligible for
benefits.

17 *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003).

18 At step one, the ALJ found that Mr. Austin has not engaged in substantial gainful activity
19 since his disability application on February 26, 2010. *See* AR 18 (ALJ decision). At step two, the
20 ALJ concluded that Mr. Austin suffers from several severe impairments including degenerative disc
21 disease of the thoracic and lumbar spine, left ankle osteopenia, obesity, depression, and
22 posttraumatic stress disorder (PTSD). *See* AR 18. With respect to step three, the ALJ determined
23 that Mr. Austin does not have an impairment or combination of impairments that meets or medically
24 equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. *See*
25 AR 18-19. At step four, the ALJ found that Mr. Austin possesses the residual functional capacity
26 (“RFC”) to perform sedentary work, as defined in 20 CFR 416.967(a) with the following
27 modifications: can lift 20 pounds, can sit for six hours in an eight-hour day, can stand and walk for
28 two hours in an eight-hour day, and can do simple repetitive tasks. *See* AR 20. Although the ALJ

1 determined that Mr. Austin's medically determinable impairments could reasonably be expected to
2 cause the alleged symptoms, the ALJ also found that Mr. Austin's statements regarding the intensity,
3 persistence, and limiting effects of his symptoms were not credible to the extent that they conflicted
4 with an RFC for sedentary work. *See AR 21.* In so finding, the ALJ relied on statements by Mr.
5 Austin's treating psychiatrist, Dr. James Dotson, and a nurse practitioner that indicated potential
6 malingering, as well as Mr. Austin's failure to comply with prescribed treatments. *See id.* Further,
7 the ALJ discredited opinions by Mr. Austin's treating physician Dr. Diana Coffa and a consulting
8 psychiatrist Dr. Jena Al-Mufti. *See AR 22-23.* The ALJ determined that both Dr. Coffa and Dr.
9 Al-Mufti had uncritically relied on Mr. Austin's unconvincing subjective statements and found their
10 respective opinions unpersuasive. *See id.* At step five, the ALJ found that Mr. Austin has no past
11 relevant work; however, after consulting with a vocational expert, the ALJ ultimately determined
12 that Mr. Austin's RFC, age, education, and work experience allow him to participate in work that
13 exists in significant numbers in the national economy. *See AR 23-24.*

14 Thereafter, Mr. Austin appealed the ALJ's decision. The Appeals Council denied the appeal
15 on May 4, 2012. AR 1. Mr. Austin then requested review in this Court. Docket No. 1.

16 II. DISCUSSION

17 A court may set aside the Commissioner's denial of benefits if it is not supported by
18 substantial evidence or if it is based on legal error. *See Magallanes v. Bowen*, 881 F.2d 747, 750
19 (9th Cir. 1989). Substantial evidence is relevant evidence that a reasonable mind might accept as
20 adequate to support a conclusion, and it requires more than a scintilla, but less than a preponderance
21 of evidence. *Id.* In determining whether substantial evidence supports the Commissioner's
22 decision, the Court reviews the administrative record as a whole. *Id.* Where the evidence is
23 susceptible to more than one rational interpretation, the ALJ's decision must be affirmed. *Andrews*
24 *v. Shalala*, 53 F.3d 1035, 1040 (9th Cir. 1995).

25 In the instant case, Mr. Austin contends that the ALJ erred for three reasons: (1) the ALJ
26 erroneously discredited Mr. Austin's statements regarding the severity of his symptoms; (2) the ALJ
27 improperly rejected the opinion of Mr. Austin's treating physician, Dr. Coffa; and (3) the ALJ
28 incorrectly rejected the opinion of Mr. Austin's consulting psychiatrist, Dr. Al-Mufti. *See Plaintiff's*

1 Motion for Summary Judgment, Docket 13, at 4-14 (“Plaintiff’s Motion”). Each of these
2 contentions is addressed below.

3 A. Mr. Austin’s Credibility

4 First, Mr. Austin argues that the ALJ did not cite sufficient evidence to discredit Mr. Austin
5 when all of the evidence is considered. *See id.* at 11. The ALJ must make a credibility
6 determination with sufficiently specific findings such that a court can conclude that the ALJ did not
7 arbitrarily discredit the claimant’s testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
8 2002). “In weighing a claimant’s credibility, the ALJ may consider [the claimant’s] reputation for
9 truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his
10 daily activities, his work record, and testimony from physicians and third parties concerning the
11 nature, severity, and effect of the symptoms of which he complains.” *Light v. SSA*, 119 F.3d 789,
12 792 (9th Cir. 1997). The ALJ may also consider an “unexplained, or inadequately explained, failure
13 to . . . follow a prescribed course of treatment.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). .
14 “[I]f the ALJ’s credibility finding is supported by substantial evidence in the record,” the Court
15 “may not engage in second-guessing.” *Thomas*, 278 F.3d at 959.

16 Here, the issue is whether the ALJ properly discredit Mr. Austin’s reports of pain and related
17 symptoms. In evaluating the credibility of a claimant’s subjective reports of pain or other
18 symptoms, an ALJ follows a two step process. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th
19 Cir. 2007). First, the ALJ must determine whether the record contains objective medical evidence of
20 an underlying impairment “which could reasonably be expected to produce the pain or other
21 symptoms alleged.” *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991). The plaintiff need not
22 show that the impairment could reasonably be expected to produce the *severity* of symptom
23 reported, only that it could reasonably have caused the *type* of symptom reported. *Lingenfelter*, 504
24 F.3d at 1036 (citing *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir.1996)).

25 Where the claimant meets this first test, the ALJ must then consider whether there is
26 affirmative evidence of malingering. *Lingenfelter*, 504 F.3d at 1036. If there is not, “the ALJ must
27 provide clear and convincing reasons for rejecting the claimant’s testimony regarding the severity of
28 symptoms.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). On the other hand, where

1 there is affirmative evidence of malingering, the ALJ need not meet the clear and convincing
2 evidence standard. *See Flores v. Comm'r of Soc. Sec.*, 237 F. App'x 251, 252 (9th Cir. 2007); *see also Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008) (holding that if
4 there exists affirmative evidence of malingering, the general requirement that the ALJ provide clear
5 and convincing reasons for an adverse credibility finding does not apply).

6 In this case, the ALJ found that there was objective medical evidence establishing that Mr.
7 Austin had degenerative disc disease of the thoracic and lumbar spine, left ankle osteopenia,
8 depression and PTSD. AR 18. The ALJ further found that “the claimant’s medically determinable
9 impairments could reasonably be expected to cause the alleged symptoms.” AR 21. The next
10 inquiry is thus whether there is affirmative evidence of malingering in the record.

11 Though the ALJ did not make an explicit finding of malingering, this is not required. *See*
12 *Carmickle*, 533 F.3d at 1160 n.1. The ALJ did identify affirmative evidence of malingering in the
13 record, which is sufficient. *Id.* In particular, the ALJ highlighted various encounters between Mr.
14 Austin and his physicians that call into question the validity of Mr. Austin’s subjective symptom
15 reports. *See* AR 21-23. For example, the ALJ referred to reports from Dr. Dotson wherein the
16 doctor stated that Mr. Austin was “observed to walk quickly down the hall without any obvious
17 discomfort” and that Mr. Austin “does not present clinically like someone who is disabled.” *See* AR
18 21. Similarly, the ALJ cited an encounter in August 2010, during which Dr. Roy Johnson, Mr.
19 Austin’s psychologist, observed Mr. Austin walking extremely slowly to his appointment but
20 walking at a more rapid pace after he left the office. *See id.* Dr. Johnson then observed Mr. Austin
21 running halfway across an intersection to wait for traffic at the median. *See id.*

22 Furthermore, the ALJ cited Dr. Dotson’s observations that Mr. Austin repeatedly has “a
23 normal affect and conversational tone in the reception area, which drastically changes for the worse
24 when he is interacting with Dr. Dotson in the office.” *See id.* The ALJ also noted that Mr. Austin
25 reported seeing munchkins, which Dr. Dotson opined was not consistent with any mental illness.
26 *See* AR 22-23. Finally, the ALJ pointed to statements from various treating and examining
27 physicians indicating potential malingering by Mr. Austin. *See* AR 21. Dr. Dotson stated that Mr.
28 Austin “may be exaggerating his symptoms for secondary gain,” and Dr. Johnson opined that “any

1 psychiatric diagnosis is contaminated by the claimant's lack of cooperation and misleading
2 information provided." *See id.* Similarly, a nurse practitioner at San Francisco General Hospital
3 indicated that Mr Austin was participating in exaggerated pain behavior. *See id.*

4 Mr. Austin contends that while the ALJ may have justifiably found some of Mr. Austin's
5 statements not credible, the ALJ did not provide sufficiently specific, clear, and convincing reasons
6 for disbelieving his testimony when the entire record is considered. *See Plaintiff's Motion at 10-12.*
7 Since the record contains affirmative evidence of malingering with regards to both physical and
8 psychological symptoms, however, the ALJ's opinion need not establish clear and convincing
9 reasons for concluding that Mr. Austin's subjective complaints were not credible. *See Carmickle,*
10 533 F.3d at 1160.

11 Mr. Austin specifically challenges the ALJ's interpretation of various facts in the record
12 indicating malingering. Mr. Austin contends that the "linchpin" of the ALJ's argument, that Mr.
13 Austin "was noted to only episodically use his cane for ambulation when distracted by his cell
14 phone," is not dispositive because there could be multiple explanations for this behavior besides
15 malingering. *See Pl.'s Mot. at 11-12.* Furthermore, Mr. Austin argues that numerous justifications
16 consistent with a finding of disability could explain his increased pace as he crossed the street. *See*
17 AR 12. Finally, Mr. Austin maintains that neither Dr. Dotson, a psychiatrist, nor Dr. Johnson, a
18 psychologist, specializes in spine, orthopedic, or pain problems, making their observations less
19 persuasive. *See id.* While it is true that there could be multiple explanations for Mr. Austin's
20 behavior in these incidents, the ALJ's interpretation of this evidence is a rational one, and thus owed
21 deference. *Magallanes*, 881 F.2d at 750 (courts "must uphold the ALJ's decision where the
22 evidence is susceptible to more than one rational interpretation."); *see also Sandgathe v. Chater*, 108
23 F.3d 978, 980 (9th Cir. 1997) (same). Further, the ALJ points to a number of additional facts in the
24 record that provide affirmative evidence of malingering, such as his nurse practitioner's statements
25 of exaggerated pain behavior, and Dr. Dotson's statements that Mr. Austin may have been
26 exaggerating his symptoms for secondary gain. AR 21, 233, 261. This Court thus finds that there
27 was affirmative and substantial evidence of malingering in the record, and that the ALJ thus did not
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1 need to cite to clear and convincing reasons for rejecting Mr. Austin's testimony about the extent of
2 his symptoms as not credible. *Carmickle*, 533 F.3d at 1160.

3 In this case, the ALJ made a number of specific factual findings in support of his finding that
4 Mr. Austin was not credible. *See AR 21*. In addition to the evidence of malingering discussed
5 above, the ALJ pointed out that Mr. Austin "refuses to cooperate with the court mandated
6 psychologist" and "takes medications that are not prescribed by his physician." *Id.* Moreover, Mr.
7 Austin "has not been fully compliant with his psychiatric medication regime." *Id.* Next, the ALJ
8 cited inconsistencies between Mr. Austin's hearing testimony and his medical records regarding his
9 reported alcohol use. *See id.* Based on these factors, the ALJ rejected Mr. Austin's testimony about
10 the extent of his symptoms "to the extent they are inconsistent with the . . . residual functional
11 capacity assessment." AR 21. The ALJ's opinion considered many of the permissible factors for
12 weighing a claimant's credibility including Mr. Austin's failure to follow prescribed treatments, Mr.
13 Austin's reputation for truthfulness, inconsistencies in Mr. Austin's testimony, and statements from
14 Mr. Austin's treating physicians. Particularly in light of the affirmative evidence of malingering in
15 the record, the Court finds that ALJ's adverse credibility determination is supported with sufficiently
16 specific findings that are substantially supported by the record as a whole. *See Thomas*, 278 F.3d at
17 959 (the court "may not engage in second-guessing." where "the ALJ's credibility finding is
18 supported by substantial evidence in the record").

19 B. Opinion of Dr. Coffa

20 Next, Claimant argues that the ALJ improperly discredited the opinion of Mr. Austin's
21 treating physician, Dr. Coffa. *See Plaintiff's Motion at 4-9*. The ALJ completely rejected Dr.
22 Coffa's opinions, finding them "neither controlling nor persuasive." AR 22. In doing so, the ALJ
23 provided three justifications: (1) the ALJ could not find any treatment records with Dr. Coffa's name
24 on them, (2) Dr. Coffa "apparently relied quite heavily on the subjective report of symptoms and
25 limitations provided by the claimant, and seemed to uncritically accept as true most, if not all, of
26 what the claimant reported," and (3) Dr. Coffa's report of Mr. Austin's lifting abilities was
27 inconsistent with Mr. Austin's hearing testimony. *Id.*

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1 As a preliminary matter, the Court concludes that Dr. Coffa was Mr. Austin's treating
2 physician. Mr. Austin correctly points out that Dr. Coffa electronically signed multiple treatment
3 records for Mr. Austin between December 2010 and June of 2011. *See* AR 406, 408, 596, 617.
4 Furthermore, throughout the record, other physicians reference Dr. Coffa's involvement with Mr.
5 Austin's treatment. *See* AR 414, 416, 418, 594. Indeed, it is clear that Dr. Coffa possessed an
6 ongoing treatment relationship with Mr. Austin. Thus, to the degree that the ALJ rejected Dr.
7 Coffa's opinion because he could not find treatment records with her name on them, he seems to
8 have overlooked relevant parts of the record.

9 The ALJ does not cite to any part of the record for his conclusion that Dr. Coffa relied
10 heavily on an uncritical acceptance of Plaintiff's subjective report of symptoms in forming her
11 opinion. AR 22. The only record of Dr. Coffa's the ALJ discusses is a treating physician
12 questionnaire filled out in August 2011. *Id.* That questionnaire asks for the clinical or laboratory
13 findings on which the doctor bases her diagnosis and physical restrictions. AR 388, 390. Dr. Coffa
14 responded that her opinions were based on "MRI and CT of spine showing nerve root compression."
15 AR 390, *see also* AR 388 (same). She also writes that Mr. Austin had "surgery [that] improved [his]
16 pain, but patient still has significant pain," and notes that persistent pain could affect his ability to
17 concentrate. AR 388. There is no other discussion of Mr. Austin's subjective reports of pain. AR
18 388-92. There is nothing in this record indicating that Dr. Coffa relied uncritically on Mr. Austin's
19 subjective reports of pain, or that her opinion was based primarily on those subjective reports as
20 opposed to the CT and MRI results referenced by Dr. Coffa, or her other observations of his
21 condition both before and after surgery. *See* AR 406, 408, 595-96 (Dr. Coffa's treatment notes from
22 before and after Mr. Austin's April 2011 surgery to relieve his leg pain). In this respect, therefore,
23 the ALJ's decision to reject Dr. Coffa's testimony (as a treating physician) is not supported by
24 substantial evidence in the record.

25 Furthermore, the ALJ's reliance, in rejecting Dr. Coffa's testimony, on the small
26 inconsistency between Dr. Coffa's diagnosis that Mr. Austin could less than ten pounds and Mr.
27 Austin's testimony that he could lift eight (8) pounds with this left hand and about 15-20 pounds
28 with this right hand, *see* AR 35, was misplaced because the discrepancy was not significant.

1 Moreover, the ALJ having found Mr. Austin not credible, was hard pressed to then rely on Mr.
2 Austin's untrustworthy statements to discredit his treating physician's statements.

3 As Mr. Austin's treating physician, Dr. Coffa's opinion was entitled to controlling weight if
4 it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not
5 inconsistent with the other substantial evidence" in the record. *See* 20 C.F.R. § 404.1527(d)(2)
6 (2012). In this case, the ALJ did not consider Dr. Coffa a treating physician and hence did not apply
7 the appropriate standard in evaluating Dr. Coffa's opinion.

8 Even if the ALJ had correctly applied the standard appropriate to a treating physician in
9 concluding that Dr. Coffa's opinion was not entitled to controlling weight, a treating physician's
10 opinion is nonetheless entitled to some weight. *See Orn v. Astrue*, 495 F.3d 625, 631-33 (9th Cir.
11 2007). "If a treating physician's opinion is not given 'controlling weight' because it is not 'well-
12 supported' or because it is inconsistent with other substantial evidence in the record, the
13 Administration considers specified factors [listed in 20 C.F.R. §§ 416.927(c) and 404.1527(c)] in
14 determining the weight it will be given." *Id.* at 631. The Ninth Circuit emphasized that "[a] finding
15 that a treating source medical opinion is not well-supported by medically acceptable clinical and
16 laboratory diagnostic techniques or is inconsistent with substantial evidence in the case record
17 means only that the opinion is not controlling weight, not that the opinion should be rejected." *See*
18 *id.* at 631-32 (internal quotation marks omitted). The ALJ must still consider the factors listed in §
19 416.927(c)(2)-(6). *Id.* at 632.

20 In the current case, the Commissioner argues that the ALJ properly rejected Dr. Coffa's
21 opinion because it "was not well supported by accepted medical techniques." *See* Defendant's
22 Motion at 5. Further, the Commissioner contends that "[w]hile Dr. Coffa electronically signed some
23 treating records, the doctor did not explain the limitations by reference to those records." *See id.*
24 Assuming for the sake of argument that Dr. Coffa's opinions were not well-supported, under *Orn*,
25 the ALJ must still consider the factors listed in 20 C.F.R. § 416.927(c). *See Orn*, 495 F.3d at 631.
26 Those factors include

27 the amount of relevant evidence that supports the opinion and the
28 quality of the explanation provided; the consistency of the medical
opinion with the record as a whole; the specialty of the physician

1 providing the opinion; and “[o]ther factors” such as the degree of
2 understanding a physician has of the Administration’s “disability
3 programs and their evidentiary requirements” and the degree of his or
4 her familiarity with other information in the case record.

5 *Id.*; see also 20 C.F.R. § 416.927(c). In the instant case, the ALJ did not analyze all of the factors
6 enumerated in 20 C.F.R. § 416.927(c) and required by the Ninth Circuit in *Orn*, but simply
7 discredited Dr. Coffa’s opinion in its entirety. See AR 22. For example, as discussed above, while
8 Dr. Coffa’s opinion may have relied partially on reports from Mr. Austin, she cites independent
9 evidence of the “MRI and CT of spine showing nerve root compression” to support her conclusion
10 regarding Mr. Austin’s exertional limitations. See AR 390. Similarly, the record documents a
11 surgery to relieve Mr. Austin’s back and leg pain in April of 2011, which is also consistent with Dr.
12 Coffa’s testimony of Mr. Austin’s long history of pain. See AR 599-602. Dr. Coffa treated Mr.
13 Austin both before and after his surgery, and thus would have had the opportunity to see the
14 progression of his condition over this critical period, and to observe the trajectory of his recovery.
15 AR 406, 408, 595-96, 617. Furthermore, the ALJ did not consider Dr. Coffa’s specialty or her
16 familiarity with Mr. Austin and his record as a whole. See AR 22. At the time of the hearing, Dr.
17 Coffa had seen Mr. Austin at least four times over the course of almost a year. AR 388-92, 406,
408, 596, 617.

18 Accordingly, the ALJ’s rejection of Dr. Coffa’s opinion cannot be affirmed on this record.
19 The ALJ failed to accord Dr. Coffa’s opinion as that of a treating physician. Even if the ALJ had
20 properly found Dr. Coffa’s opinion was not entitled to controlling weight, under *Orn*, the ALJ
21 should have analyzed all of the applicable factors listed in § 416.927(c) to determine the appropriate
22 weight to accord to Dr. Coffa’s opinion. The ALJ did not do so. These failures constitute reversible
23 legal error.

24 C. Opinion of Dr. Al-Mufti

25 Additionally, Mr. Austin contends that the ALJ committed legal error by failing to credit the
26 opinion of his consultative examining psychiatrist, Dr. Jena Al-Mufti. See Plaintiff’s Motion at 13-
27 14. Dr. Al-Mufti provided a consultative psychiatric evaluation of Mr. Austin on July 27, 2010. See
28 AR 23, 210-15. During this single appointment, Dr. Al-Mufti reviewed Mr. Austin’s records,

1 conversed with Mr. Austin, and administered tests designed to determine Mr. Austin's level of
2 mental functioning. *See* AR 210-15. In conclusion, Dr. Al-Mufti assigned Mr. Austin a Global
3 Assessment of Functioning (GAF) of 45-50, denoting serious symptoms. *See* AR 23, 213. After
4 reviewing her report, the ALJ gave Dr. Al-Mufti's opinion "no weight because she did not
5 administer any malingering tests despite the extensive record, which shows symptom exaggeration."
6 *See* AR 23.

7 "As a general rule, more weight should be given to the opinion of a treating source than to
8 the opinion of doctors who do not treat the claimant." *Lester*, 81 F.3d at 830. While the opinion of
9 an examining physician is entitled to less deference than that of a treating physician, "the opinion of
10 an examining doctor, even if contradicted by another doctor, can only be rejected for specific and
11 legitimate reasons that are supported by substantial evidence in the record." *Id.* at 830-31. Dr. Al-
12 Mufti's diagnosis of antisocial personality disorder, *see* AR 213, is directly contradicted by Mr.
13 Austin's treating psychiatrist, Dr. Dotson, who opined that Mr. Austin "does not present clinically
14 like someone who is disabled." *See* AR 236. Further, as mentioned, there is extensive evidence of
15 Mr. Austin's potential malingering. Dr. Dotson opined that Mr. Austin "may be exaggerating his
16 symptoms for secondary gain," and Mr. Austin's nurse practitioner suggested that Mr. Austin
17 participates in exaggerated pain behavior. *See* AR 233, 261. Dr. Johnson stated that "any
18 psychiatric diagnosis is contaminated by the claimant's lack of cooperation and misleading
19 information provided." *See* AR 232. Despite this significant evidence of potential malingering and
20 Dr. Al-Mufti's statement that she reviewed Mr. Austin's record (which made reference to potential
21 malingering), *see* AR 210, Dr. Al-Mufti failed to administer any malingering tests. The ALJ had a
22 sufficient basis to reject Dr. Al-Mufti's opinion. Moreover, given the ALJ properly discredited Mr.
23 Austin's testimony, the ALJ's rejection of Dr. Al-Mufti's opinion is based on specific and legitimate
24 reasons supported by substantial evidence. *See Andrews*, 52 F.3d at 1043 (holding that "an opinion
25 of disability premised to a large extent upon the claimant's own accounts of his symptoms and
26 limitations may be disregarded, once those complaints themselves have been properly discounted.").
27
28

1 D. Remedy

2 Having concluded that the ALJ erred in his decision denying benefits, the Court must decide
3 whether or not there should be a remand for further administrative proceedings. In *Benecke v.*
4 *Barnhart*, 379 F.3d 587 (9th Cir. 2004), the Ninth Circuit held that

5 [r]emand for further administrative proceedings is appropriate if
6 enhancement of the record would be useful. Conversely, where the
7 record has been developed fully and further administrative
8 proceedings would serve no useful purpose, the district court should
9 remand for an immediate award of benefits. More specifically, the
10 district court should credit evidence that was rejected during the
11 administrative process and remand for an immediate award of benefits
12 if (1) the ALJ failed to provide legally sufficient reasons for rejecting
13 the evidence; (2) there are no outstanding issues that must be resolved
14 before a determination of disability can be made; and (3) it is clear
15 from the record that the ALJ would be required to find the claimant
16 disabled were such evidence credited.
17

18 *Id.* at 593. The ALJ erred in rejecting Dr. Coffa's opinion without considering all the relevant facts;
19 it is not clear what weight the ALJ would ultimately give to Dr. Coffa's opinion upon proper
20 consideration. Nor is it not clear from the record that the ALJ would be required to find Mr. Austin
21 disabled if Dr. Coffa's testimony were credited in part. On remand, the ALJ should evaluate Dr.
22 Coffa's opinion in light of the factors enumerated in *Orn*, and reassess Mr. Austin's claim of
23 disability in light of that evidence.

24 This order disposes of Docket Nos. 13 and 21.

25 IT IS SO ORDERED.
26

27 Dated: May 9, 2013
28



EDWARD M. CHEN
United States District Judge